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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

NOV 19 1992

MEMORANDUM TO: Paul H. Lohaus, Acting Branch Chief
Regulation Development Branch, RES

FROM: Stuart A. Treby
Assistant General Counsel for
Rulemaking and Fuel Cycle
Office of the General Counsel

SUBJECT: APPLICABILITY OF BACKFIT RULE TO 10 CFR PART
55 RULEMAKING ON OPERATOR REQUALIFICATION
EXAMINATIONS

In an October 7, 1992 memorandum, you requested legal guidance on whether the proposed 10 CFR Part 55 rulemaking on operator requalification examinations is subject to the Backfit Rule, 10 CFR 50.109. The issue, as raised at the CRGR meeting where this rulemaking was discussed, is whether the Backfit Rule applies only to rules in 10 CFR Part 50, or whether the Backfit Rule applies to all NRC rules which affect nuclear power plant licensees. This memorandum provides OGC's response to your requests. If there are any questions, please contact Geary S. Mizuno at 504-1639.

After a review of the Backfit Rule and the statement of considerations (SOC) for the 1985 and 1988 rules, OGC concludes that the Backfit Rule applies to changes in any Commission rule which may affect the design, construction or operation of a nuclear power plant, regardless of its location in Title 10 of the Code of Federal Regulations. Therefore, the proposed Part 55 rulemaking is subject to the Backfit Rule.

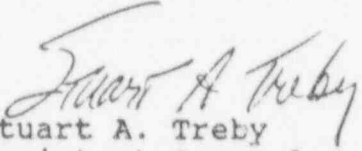
Section 50.109(a)(1) of the Backfit Rule defines backfitting as follows:

Backfitting is defined as the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position...(emphasis added).

By its terms, Section 50.109(a)(1) does not limit the scope of Commission rules which could be the basis for a backfit to 10 CFR

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Part 50. The SOCs for the 1985 and 1988 Backfit Rules suggest that the Commission's concern was with "plant-specific changes and generic changes as applied to one or more classes of power reactors." Nowhere in the SOCs did the Commission suggest that the Backfit Rule applied only to changes to rules (or changes in interpretations of rules) in Part 50, as opposed to all NRC rules in Title 10 of the Code of Federal Regulations. Limiting the reach of the Backfit Rule solely to rulemaking changes in Part 50 would not fully achieve the objective of the Backfit Rule, which was to control the number of changes being imposed upon nuclear power plants. In sum, it is OGC's view that the Backfit Rule applies to all NRC rulemakings which affect nuclear power plant licensees, regardless of their location in Title 10 of the Code of Federal Regulations, and that the proposed Part 55 rulemaking is subject to the Backfit Rule¹.


Stuart A. Treby
Assistant General Counsel for
Rulemaking and Fuel Cycle
Office of the General Counsel

cc: J. Cutchin
M. Schwartz
G. Mizuno

¹Your staff suggested that promulgation of the original Part 55 rule on operator qualifications was determined to not be subject to the Backfit Rule. However, the basis for that determination was that the operator qualification examination requirements were required by statute (the Nuclear Waste Policy Act of 1982), and that the Backfit Rule does not apply to statutorily-mandated requirements. It was also suggested by your staff that the fitness-for-duty changes to Part 55 (56 FR 32066) were excluded from the scope of the Backfit Rule. However, OGC's review of that rulemaking indicates that the rule made applicable to licensed operators the conditions and cut-off levels which the Commission previously established for nuclear power plant licensees in 10 CFR Part 26. Since the Part 55 changes in that case affected only operators, the backfit analysis correctly concluded that the rulemaking did not constitute a "backfit" as defined in the Backfit Rule.